No. 14-462

In the Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

–v–

AMY IMBURGIA ET AL.,

Respondents.

On Writ of Certiorari to the
California Court of Appeal, Second District

BRIEF OF CALIFORNIA LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. CALIFORNIA COURTS ARE NOT HOSTILE TO ARBITRATION 3

A. California Courts Did Not Discriminate Against Arbitration Before *Concepcion* ... 4

B. California's Recent FAA Jurisprudence Has Also Been Faithful to this Court's Precedents 9

CONCLUSION 15

APPENDIX

List of Amici Curiae California Law Professors 16

TABLE OF AUTHORITIES

Page

CASES

A&M Produce Co. v. FMC Corp.,
186 Cal. Rptr. 114 (Ct. App. 1982) 18

American Express Co. v. Italian Colors Restaurant,
133 S.Ct. 2304 (2013) ..... passim

Armendariz v. Foundation Health Psychcare Services, Inc., 6 P.3d 669 (Cal. 2000) ... 10, 11, 12

AT&T Mobility LLC v. Concepcion,
131 S.Ct. 1740 (2011) ..... passim

Berent v. CMH Homes, Inc.,
___S.W.3d___, No. E201301214SCR11CV,
2015 WL 3526984 (Tenn. June 5, 2015) 13

Booker v. Robert Half Int'l, Inc.,
413 F.3d 77 (D.C. Cir. 2005) 6

Brewer v. Missouri Title Loans,
364 S.W.3d 486 (Mo. 2012) 10, 16

Broughton v. Cigna Healthplans of Cal.,
988 P.2d 67 (Cal. 1999) 4, 5

Chavarria v. Ralphs Grocery Co.,
733 F.3d 916 (9th Cir. 2013) 15

Cheek v. United Healthcare of Mid–Atlantic, Inc., 835 A.2d 656 (Md. 2003) 11

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) 6

Coady v. Cross Country Bank, Inc.,
729 N.W.2d 732 (Wis. App. 2007) 10

TABLE OF AUTHORITIES—Continued

Page

Coleman v. Prudential Bache Sec., Inc.,
802 F.2d 1350 (11th Cir. 1986) 15

Cooper v. QC Financial Services, Inc.,
503 F. Supp. 2d 1266 (D. Ariz. 2007) 9

Credit Bureau, Inc. v. Cingular Wireless LLC,
379 F.3d 159 (5th Cir. 2004) 12

D.R. Horton Inc. v. Cuda,
357 NLRB No. 184, 2012 WL 36274 (2012) 19

Dale v. Comcast Corp.,
498 F.3d 1216 (11th Cir. 2007) 10

Dan Ryan Builders, Inc. v. Nelson,
737 S.E.2d 550 (W. Va. 2012) 12

Discover Bank v. Superior Court,
113 P.3d 1100 (Cal. 2005) 9, 19

Doctor's Associates, Inc. v. Casarotto,
517 U.S. 681 (1996) 7, 9

Dunlap v. Berger,
567 S.E.2d 265 (W. Va. 2002) 10

E.E.O.C. v. Waffle House, Inc.,
534 U.S. 279 (2002) 6

Feeney v. Dell Inc.,
908 N.E.2d 753 (Mass. 2009) 8, 10

Figueroa v. THI of New Mexico at Casa Arena Blanca, LLC,
306 P.3d 480 (N.M. Ct. App. 2012) 17

Fiser v. Dell Computer Corp.,
188 P.3d 1215 (N.M. 2008) 10

TABLE OF AUTHORITIES—Continued

Page

Gentry v. Superior Court,
165 P.3d 556 (Cal. 2007) 18, 19

Gibson v. Neighborhood Health Clinics, Inc.,
121 F.3d 1126 (7th Cir. 1997) 11

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 6

Guidotti v. Legal Helpers Debt Resolution, L.L.C., ___F. Supp. 3d___ No. CIV.A. 11-1219 JBS, 2014 WL 6863183 (D.N.J. Dec. 3, 2014) 16

Herron v. Century BMW,
693 S.E.2d 394 (S.C. 2010) 10

Hill v. Garda CL Nw., Inc.,
308 P.3d 635 (Wash. 2013) 17

Hull v. Norcom, Inc.,
750 F.2d 1547 (11th Cir. 1985) 12

In re Checking Account Overdraft Litig.,
___F. Supp. 3d___, No. 1:09-MD-02036, 2015 WL 464266 (S.D. Fla. Feb. 3, 2015) 16

In re Poly-Am., L.P.,
262 S.W.3d 337 (Tex. 2008) 8

Independence Cnty. v. City of Clarksville,
386 S.W.3d 395 (Ark. 2012) 11

Iskanian v. CLS Transp. Los Angeles, LLC,
327 P.3d 129, (Cal. 2014) 19

TABLE OF AUTHORITIES—Continued

Page

Jimenez v. Cintas Corp.,
___S.W.3d__, No. ED 101015, 2015 WL 160451 (Mo. Ct. App. Jan. 13, 2015) 11

Kelker v. Geneva-Roth Ventures, Inc.,
303 P.3d 777 (Mont. 2013) 16

Kinkel v. Cingular Wireless LLC,
857 N.E.2d 250 (Ill. 2006) 10

Kristian v. Comcast Corp.,
446 F.3d 25 (1st Cir. 2006) 6

Lazado v. Dale Baker Oldsmobile, Inc.,
91 F.Supp.2d 1087 (W.D. Mich. 2000) 10

Leonard v. Terminix Int'l Co., L.P.,
854 So. 2d 529 (Ala. 2002) 9

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 5

Muhammad v. County Bank of Rehoboth Beach, Delaware, 912 A.2d 88 (N.J. 2006) 9

Noohi v. Toll Bros., Inc.,
708 F.3d 599 (4th Cir. 2013) 11

Picardi v. Eighth Judicial District,
251 P.3d 723 (Nev. 2011) 8

Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev. (US), LLC,
282 P.3d 1217 (Cal. 2012) 19, 20

Powertel v. Bexley,
743 So. 2d 570 (Fla. Ct. App. 1999) 9

TABLE OF AUTHORITIES—Continued

Page

Rembert v. Ryan's Family Steak Houses, Inc.,
596 N.W.2d 208 (Mich. 1999) 7

Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477 (1989) 6

Schnuerle v. Insight Comm, Co., L.P.,
376 S.W.3d 561 (Ky. 2012) 16

Scott v. Cingular Wireless,
161 P.3d 1000 (Wash. 2007) 9

Sec. Serv. Fed. Credit Union v. Sanders,
264 S.W.3d 292 (Tex. App. 2008) 7

Shearson/Am. Exp., Inc. v. McMahon,
482 U.S. 220 (1987) 5, 6

Siopes v. Kaiser Found. Health Plan, Inc.,
312 P.3d 869 (Haw. 2013) 16

Smith v. Jem Grp., Inc.,
737 F.3d 636 (9th Cir. 2013) 16

Sonic Calabasas A, Inc. v. Moreno,
311 P.3d 184 (Cal. 2013) 17, 18

Stevens/Leinweber/Sullens, Inc. v. Holm Dev. & Management, Inc.,
795 P.2d 1308 (Az. Ct. App. 1990) 11

THI of N. M. at Hobbs Ctr., LLC v. Patton,
741 F.3d 1162 (10th Cir. 2014) 15

Thibodeau v. Comcast Corp.,
912 A.2d 874 (Pa. Super. Ct. 2006) 10

Tillman v. Commercial Credit Loans, Inc.,
655 S.E.2d 362 (N.C. 2008) 12

TABLE OF AUTHORITIES—Continued

Page

Trist v. Child,
88 U.S. (21 Wall.) 7

Vasquez-Lopez v. Beneficial Oregon, Inc.,
152 P.3d 940 (Or. App. 2007) 10

Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.,
489 U.S. 468 (1989) 2

Williams v. Walker-Thomas Furniture Co.,
350 F.2d 445 (D.C. Cir. 1965) 18

STATUTES

Federal Arbitration Act
9 U.S.C. § 2 ..... passim

OTHER AUTHORITIES

David Horton,
Federal Arbitration Act Preemption, Purposivism, and State Public Policy,
101 GEO. L.J. 1217 (2013) 6

G. Richard Shell,
Contracts in the Modern Supreme Court,
81 CAL. L. REV. 433 (1993) 6

Hiro N. Aragaki,
Equal Opportunity for Arbitration,
58 UCLA L. REV. 1189 (2011) 4

INTEREST OF AMICI CURIAE

Amici curiae are law professors from the State of California.[1] *Amici* have years of experience teaching and publishing in arbitration, contracts, civil procedure, and related fields. *Amici* write to improve this Court's understanding of how California judges have interpreted the Federal Arbitration Act ("FAA").

SUMMARY OF ARGUMENT

The relief that Petitioner seeks is extraordinary. Petitioner's adhesive Customer Agreement prohibits arbitration if the law of a customer's state would invalidate its class arbitration waiver. The California Court of Appeal enforced this provision as written and held that because Petitioner's class arbitration waiver is invalid under California law, there is no agreement to arbitrate. Dissatisfied with the consequences of its own draftsmanship, Petitioner urges this Court to overturn the state panel's interpretation. But "the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Volt Info. Sciences, Inc. v. Bd.*

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel of party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have issued blanket consents to the filing of amicus briefs.

of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 474 (1989).

Accordingly, Petitioner and its *amici* seek to transform this case into a referendum on the California judiciary's alleged "hostility to arbitration." Brief for Petitioner at 2; *see also generally* Brief of Amicus Curiae DRI—The Voice of the Defense Bar In Support of Petitioner DIRECTV, Inc. ("DRI Brief").[2] By detailing the California Supreme Court's alleged "attempts to evade the FAA's mandate," *id.* at 5, they hope to convince this Court of the need for heavy-handed intervention.

These gloomy atmospherics are a smokescreen. Petitioner's *amici* DRI, which leads the charge on this issue, devotes most of its brief to highlighting cases in which the California Supreme Court refused to enforce one-sided arbitration clauses that made it harder for plaintiffs to prosecute state statutory causes of action. *See id.* at 5-11. But DRI does not mention that most other jurisdictions take similar steps to ensure that substantive rights survive their transplant from the judicial to arbitral forum.

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[2] *See also* Brief of Chamber of Commerce of the United States of America, National Association of Manufacturers, and Retail Litigation Center, Inc., as Amici Curiae in Support of Petitioner ("Chamber Brief") at 4, 6-12 (arguing that the California Court of Appeal's opinion "impermissibl[y] discriminat[es] against arbitration"); Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioner ("Pacific Legal Brief") at 19-21 ("The decision below continues a collision course upon which California courts have embarked with this Court's decisions regarding FAA preemption.").

DRI also contends that the California Supreme Court has given short shrift to this Court's opinions in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011) and *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013). *See* DRI Brief at 15-21. However, DRI condemns the state justices for not sharing *DRI*'s own, highly-idiosyncratic view that these cases preclude any "assessment of whether an arbitration agreement is sufficiently fair." *Id.* at 18. Moreover, DRI omits recent cases in which California judges have broadened the FAA's scope.

ARGUMENT

I. CALIFORNIA COURTS ARE NOT HOSTILE TO ARBITRATION

Petitioner's *amici* go to great lengths to try to get this Court to micromanage California's common law of contracts. For instance, DRI devotes nearly its entire brief to arguing that the California Supreme Court has "thwart[ed] the FAA." DRI Brief at 4.[3] That is simply not true. This section sets the record straight about California's FAA jurisprudence.

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[3] The California Supreme Court's only involvement in this matter was to deny discretionary review of the Court of Appeal's opinion. Moreover, even if it were possible to demonstrate that a constantly-evolving, multi-member court was capable of harboring continuing, collective animus toward arbitration, DRI does not explain how such a showing should inform the Court's preemption analysis.

A. California Courts Did Not Discriminate Against Arbitration Before *Concepcion*

DRI argues that the California Supreme Court routinely ignored the FAA's preemptive force during the period before this Court decided *Concepcion*. *See* DRI Brief at 3, 5-11. But on issue after issue, DRI faults the state high court for adopting majority or comparatively moderate positions.

First, citing cases such as *Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67 (Cal. 1999), DRI objects that the California justices invalidated arbitration clauses when necessary to "ensure that plaintiffs could vindicate state statutory rights." *Id.* at 3.[4] However, before *Concepcion*, this was not some wild-haired, deviant approach. To the contrary, it was a bedrock principle of federal arbitration law. As this Court repeatedly acknowledged, the choice between arbitration and litigation should not affect the outcome of a dispute:

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[4] In *Broughton*, the California Supreme Court compelled arbitration of a damages claim brought by a mother and her son against a health insurer. *See Broughton*, 988 P.2d at 71-72, 80. However, the state high court also held that it would be cost-prohibitive for the plaintiffs to arbitrate their request for a public injunction. *See id.* at 77-78. As the justices explained, because arbitral jurisdiction expires shortly after the award, and arbitrators' rulings do not have collateral estoppel effect, the plaintiffs would need to endure the cost, hassle, and uncertainty of filing a new arbitration whenever they needed to enforce or modify the decree. *Id.* at 77; *see also* Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189, 1252 (2011) ("*Broughton* was predicated on a particularized determination that there are real and unavoidable discontinuities between arbitration and litigation").

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985); *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 229 (1987); *Rodriguez de Quijas v. Shearson/*Am. Exp., Inc., 490 U.S. 477, 481 (1989); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001); *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 296 n.10 (2002).

Although these cases involved federal statutory causes of action, the FAA's guarantee of outcome-neutrality extended to state-created rights as well. As then-Judge John Roberts explained in a case involving alleged violations of District of Columbia anti-discrimination legislation, "[s]tatutory claims may be subject to agreements to arbitrate, so long as the agreement does not require the claimant to forgo substantive rights afforded under the statute." *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 79 (D.C. Cir. 2005); *see also Kristian v. Comcast Corp.*, 446 F.3d 25, 29 (1st Cir. 2006) (noting that an arbitration clause cannot "prevent the vindication of statutory rights under state law").[5]

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[5] *Accord, Rembert v. Ryan's Family Steak Houses, Inc.*, 596 N.W.2d 208, 226 (Mich. 1999) (ordering state employment discrimination claim to arbitration on the condition that the

Putting a different rhetorical gloss on the same argument, DRI repeatedly accuses California courts of discriminating against arbitration by invoking the state's "public policy against exculpatory contracts." DRI Brief at 8-10. But that approach is entirely consistent with the FAA's text. Section 2, the statute's centerpiece, instructs courts to annul arbitration clauses under "generally applicable contract defenses." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996). The defense of violation of public policy has long been "a rule of the common law of universal application." *Trist v. Child*, 88 U.S. (21 Wall.) 441, 448 (1874).[6] Courts from across the country have observed that "the tenet that a contract may be invalidated on grounds that it violates public policy is a principle of [s]tate contract law that 'arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.'" *Feeney v. Dell Inc.*, 908 N.E.2d 753, 768 (Mass. 2009) (quotation

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"procedures are fair so that the employee may effectively vindicate his statutory rights"); *Sec. Serv. Fed. Credit Union v. Sanders*, 264 S.W.3d 292, 300 (Tex. App. 2008) (striking down arbitration clause that impaired the plaintiffs' exercise of their Texas Deceptive Trade Practices Act rights).

[6] *See also* David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1224, 1255-56 (2013) ("Congress debated and passed the statute during the golden age of the public policy doctrine—a time when courts held that a contract violated state public policy more frequently than they invoked garden-variety rules such as mistake, duress, lack of consideration, or the statute of frauds"); G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 433, 529 n.82 (1993) (observing that "the public policy [defense] had surprising vitality in many jurisdictions during the *Lochner* era").

omitted); *Picardi v. Eighth Judicial District*, 251 P.3d 723, 726 (Nev. 2011) ("courts may refuse to enforce [an arbitration clause] that contravenes the state's public policy"); *In Re Poly-Am., L.P.*, 262 S.W.3d 337, 347 (Tex. 2008) (rejecting the argument that "the FAA preempts all state public-policy grounds for finding the agreement to arbitrate unenforceable" because the statute "require[s] only that agreements to arbitrate be placed 'upon the same footing as other contracts'") (quoting *Doctor's Assocs.*, 517 U.S. at 687)).

Consider *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), which *Concepcion* abrogated. From DRI's brief, one might think that California stood alone by invalidating class arbitration waivers that exonerated defendants from numerous low-value claims. *See* DRI Brief at 9-10. But *Discover Bank* was the leading approach. Indeed, courts routinely nullified class arbitration waivers for serving as "exculpatory clause[s]," *Muhammad v. County Bank of Rehoboth Beach, Delaware*, 912 A.2d 88, 99 (N.J. 2006), and giving drafters carte blanche to engage in "a broad range of wrongful conduct." *Scott v. Cingular Wireless*, 161 P.3d 1000, 1009 (Wash. 2007).[7]

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[7] *See also Leonard v. Terminix Int'l Co., L.P.*, 854 So. 2d 529, 535-36 (Ala. 2002); *Cooper v. QC Financial Services, Inc.*, 503 F. Supp. 2d 1266, 1279-80 (D. Ariz. 2007); *Powertel v. Bexley*, 743 So. 2d 570, 576 (Fla. Ct. App. 1999); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007) (applying Georgia law); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 274 (Ill. 2006); *Lazado v. Dale Baker Oldsmobile, Inc.*, 91 F.Supp.2d 1087, 1105 (W.D. Mich. 2000); *Feeney*, 908 N.E.2d at 762-68; *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18, 24 (Mo. 2010); *Fiser*

Likewise, DRI argues that *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000) "invented" a rule "mandating a 'modicum of bilaterality' in arbitration—*i.e.*, that an arbitration clause required as a condition of employment must apply to both claims more likely to be brought by an employer and claims more likely to be brought by an employee." DRI Brief at 8. But *Armendariz* drew on a venerable line of cases from other jurisdictions that *prohibit* non-mutual arbitration clauses in *all contexts* by holding that they lack consideration. *See Stevens/Leinweber/Sullens, Inc. v. Holm Dev. & Management, Inc.*, 795 P.2d 1308, 1313 (Az. Ct. App. 1990).[8] According to these courts, because the FAA's separability doctrine treats arbitration clauses as independent contracts within broader "container" contracts, "the consideration exchanged for one party's promise to arbitrate must be the other party's promise to arbitrate." *Hull v. Norcom, Inc.*, 750 F.2d 1547, 1550 (11th Cir. 1985).

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v. Dell Computer Corp., 188 P.3d 1215, 1222 (N.M. 2008); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 373 (N.C. 2008); *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940, 944 (Or. App. 2007); *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 886 (Pa. Super. Ct. 2006); *Coady v. Cross Country Bank, Inc.*, 729 N.W.2d 732, 746 (Wis. App. 2007); *Herron v. Century BMW*, 693 S.E.2d 394, 399 (S.C. 2010); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 272 n.3 (W. Va. 2002).

[8] *See also Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1131 (7th Cir. 1997); *Noohi v. Toll Bros., Inc.*, 708 F.3d 599, 611–12 (4th Cir. 2013); *Independence Cnty. v. City of Clarksville*, 386 S.W.3d 395, 399 (Ark. 2012); *Cheek v. United Healthcare of Mid-Atlantic, Inc.*, 835 A.2d 656, 669 (Md. 2003); *Jimenez v. Cintas Corp.*, ___S.W.3d___, No. ED 101015, 2015 WL 160451, at *8 (Mo. Ct. App. Jan. 13, 2015).

Armendariz does not sweep nearly so far. It only governs adhesive employment agreements, not all contracts. Moreover, it merely factors an arbitration clause's imbalance into the unconscionability analysis, instead of deeming it to be a fatal lack of consideration. In fact, many states follow similar rules. *See, e.g., Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 372 (N.C. 2008) ("[t]he one-sidedness of the clause . contributes to our overall conclusion that it is unconscionable"); *Dan Ryan Builders, Inc. v. Nelson*, 737 S.E.2d 550, 560 (W. Va. 2012) ("in assessing whether a contract provision is substantively unconscionable, a court may consider whether the provision lacks mutuality of obligation").[9]

In sum, DRI fails to prove that "California in particular has a history of aggressively refusing to enforce arbitration agreements." DRI Brief at 5. Before *Concepcion*, California was just one of many jurisdictions that exercised its prerogative under section 2 to police arbitration clauses for fairness.

B. California's Recent FAA Jurisprudence Has Also Been Faithful to this Court's Precedents

DRI also contends that California courts "have continued to resist the FAA's preemptive mandate" after *Concepcion Italian Colors*. DRI Brief at 15-20.

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[9] *See also Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 170 (5th Cir. 2004) ("[t]he[se] cases do not necessarily express the impermissible view that arbitration is inferior to litigation, for a choice of remedies is better than being limited to one forum") (applying Louisiana law); *Berent v. CMH Homes, Inc.*, ___S.W.3d___, No. E201301214SCR11CV, 2015 WL 3526984, at *10 (Tenn. June 5, 2015) (rejecting the argument that *Concepcion* preempts these decisions).

But DRI criticizes the state judiciary for failing to conform to *DRI*'s unique reading of those opinions. In addition, DRI overlooks recent California decisions that have expanded the scope of the FAA.

According to DRI, *Concepcion* and *Italian Colors* require courts to robotically enforce arbitration clauses "even when this leads to a result at odds with state public policy, state unconscionability doctrine, or other principles of state law." DRI Brief at 30. This is a dramatic overstatement. Rather than immunizing flagrantly one-sided arbitration clauses from state law—a result that would write section 2 out of the statute—*Concepcion* and *Italian Colors* rejected the argument that *the class action device* was necessary for plaintiffs to vindicate "negative value" causes of action. Indeed, *Concepcion*'s core reasoning—that class arbitration "interferes with fundamental attributes of arbitration" because it is "slower, more costly, and more likely to generate procedural morass than final judgment"—does not extend beyond the class setting. *Concepcion*, 131 S.Ct. at 1748-51.[10]

Likewise, *Italian Colors* relied heavily on the fact that waiving the right to *aggregate* a claim does

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[10] In fact, *Concepcion* had no quarrel with the idea that both unconscionanility and violation of public policy are "generally applicable contract defenses" within the meaning of section 2. *See Concepcion*, 131 S.Ct. at 1746-47. Instead, *Concepcion* warned that these rules would be preempted if used in a way that is incompatible with the FAA's "purposes and objectives." *See id.* at 1747 (providing as an example "a case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery").

not mean surrendering "*the right to pursue*" the claim. *Italian Colors*, 133 S.Ct. at 2310-11 ("The class-action waiver no more eliminates th[e] parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938."). This context-specific logic does not suggest that the FAA precludes states from determining that an arbitration clause eviscerates a particular plaintiff's substantive rights.

And indeed, the other cases that DRI cites do not support its breathtaking assertion that "[t]he FAA imposes a binding value judgment about the merits of enforcing arbitration agreements as written" without regard to the consequences. DRI Brief at 19. These decisions merely explain that state law cannot deem *the bare existence of an arbitration clause* to constitute a waiver of substantive rights. *See id.* at 18-20 (citing *McMahon*, 482 U.S. at 232; *Coleman v. Prudential Bache Sec., Inc.*, 802 F.2d 1350, 1352 (11th Cir. 1986); *Ex parte McNaughton*, 728 So. 2d 592, 597 (Ala. 1998); *THI of N.M. at Hobbs Ctr., LLC v. Patton*, 741 F.3d 1162, 1169 (10th Cir. 2014)). They do not speak to the discrete and more granular issue of whether state law can nullify *particular one-sided terms* within arbitration provisions.

For these reasons, nearly every court to consider the issue has recognized that *Concepcion* and *Italian Colors* "cannot be read to immunize all arbitration agreements from invalidation no matter how unconscionable they may be." *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 927 (9th Cir. 2013); *In re Checking Account Overdraft Litig.* MDL No. 2036, 685 F.3d 1269, 1277 (11th Cir. 2012) ("[T]here are instances

wherein a state law may invalidate an arbitration agreement without being preempted by the FAA. Indeed, the phrase 'save upon such grounds as exist at law or in equity for the revocation of any contract' in § 2 must have meaning." (quoting 9 U.S.C. § 2)).[11]

Against this backdrop, DRI's critique evaporates. For example, DRI cites *Sonic Calabasas A, Inc. v. Moreno*, 311 P.3d 184 (Cal. 2013) ("*Sonic II*") as proof of the California Supreme Court's purported defiance of *Concepcion* and *Italian Colors*. DRI Brief at 16-20. In *Sonic II*, an arbitration clause waived an employee's entitlement to a "Berman hearing": an informal administrative proceeding designed to help employees bring wage claims. *See Sonic II*, 311 P.3d at 190-91. The state high court held that the FAA preempts a previous opinion that held that arbitration clauses can never eliminate an employee's Berman rights. *See id.* at 199-200. Yet the state justices also reasoned that because Berman hearings boast

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[11] *See also Smith v. Jem Grp., Inc.*, 737 F.3d 636, 641 (9th Cir. 2013) (applying Washington law); *In Re Checking Account Overdraft Litig.*, ___F. Supp. 3d___, No. 1:09-MD-02036, 2015 WL 464266, at *5 (S.D. Fla. Feb. 3, 2015); *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, ___F. Supp. 3d___ No. CIV.A. 11-1219 JBS, 2014 WL 6863183, at *13 (D.N.J. Dec. 3, 2014); *Siopes v. Kaiser Found. Health Plan, Inc.*, 312 P.3d 869, 896 n.13 (Haw. 2013); *Schnuerle v. Insight Comm, Co., L.P.*, 376 S.W.3d 561, 578 (Ky. 2012); *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 493 (Mo. 2012); *Kelker v. Geneva-Roth Ventures, Inc.*, 303 P.3d 777, 784 (Mont. 2013); *Figueroa v. THI of New Mexico at Casa Arena Blanca, LLC*, 306 P.3d 480, 486 (N.M. Ct. App. 2012); *Hill v. Garda CL Nw., Inc.*, 308 P.3d 635, 640 (Wash. 2013).

special pro-employee features,[12] the relinquishment of these rights, like any other factor, can inform the unconscionability calculus:

> Waiver of these protections does not necessarily render an arbitration agreement unenforceable, nor does it render an arbitration agreement unconscionable per se. But waiver of these protections in the context of an agreement that does not provide an employee with an accessible and affordable arbitral forum for resolving wage disputes may support a finding of unconscionability.

Id. at 203. Although DRI complains that *Sonic II* "flout[s] *Concepcion*" by asking whether arbitration clauses are tainted by "unfairness," DRI Brief at 18, that very inquiry—whether an adhesive term is "overly harsh"—is the lynchpin of the unconscionability doctrine. *A&M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 122 (Ct. App. 1982); *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965). The true target of DRI's ire is not the California judiciary, but section 2, which makes arbitration clauses susceptible to black-letter contract defenses.

Finally, DRI's speculation about the state justices' dark motives is impossible to square with the fact

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[12] Berman hearings include "procedural informality, assistance of a translator, . . . an expert adjudicator who is authorized to help the parties by questioning witnesses and explaining issues and terms, and provisions on fee shifting, mandatory undertaking, and assistance of the Labor Commissioner as counsel to help employees defend and enforce any award on appeal." *Sonic II*, 311 P.3d at 203.

that they have recently enlarged the FAA's ambit. Consider their treatment of class arbitration waivers in employment disputes. Previously, in *Gentry v. Superior Court*, 165 P.3d 556, 563-68 (Cal. 2007), the state supreme court had imported *Discover Bank*'s rule that certain class action bans are unconscionable from the consumer to the employment sphere. Then, after *Concepcion*, the National Labor Relations Board ("NLRB") held in *D.R. Horton Inc. v. Cuda*, 357 NLRB No. 184, 2012 WL 36274, *15-16 (2012), that class arbitration waivers violate the National Labor Relations Act. Nevertheless, in *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129, 135-37, 141-42 (Cal. 2014), the California Supreme Court determined that the FAA preempted *Gentry* and rejected the NRLB's conclusions in *Horton*. As the justices explained, "*Concepcion* held that the FAA prevent[s] states from mandating or promoting procedures incompatible with arbitration." *Id.* at 137. That is not the logic of a court so intent on "evad[ing]" the FAA that it "requires this Court's ongoing supervision." DRI Brief at 26.[13]

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[13] Similarly in *Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev. (US), LLC*, 282 P.3d 1217, 1224-41 (Cal. 2012)—which DRI does not cite—the California Supreme Court became the first court in the country to enforce an arbitration clause that appeared in real property parcel's declaration of covenants, conditions, and restrictions ("CC&Rs"). The state high court held that the provision was binding on a homeowner's association even though its members "did not bargain . . . over the terms of the [p]roject CC&Rs or participate in their drafting." *Id.* at 1224-31 (noting that "[a]n arbitration clause within a contract may be binding on a party even if the party never actually read the clause"). In addition, the justices

CONCLUSION

This Court should affirm the California Court of Appeal's decision.

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rejected the trial court's finding that the arbitration provision was unconscionable. *See Id.* at 1223-34.

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